No. 75-1347

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

OVIDIO OMAR URDIALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 523 F.2d 1245.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1975. A petition for rehearing was denied on February 23, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on March 18, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission of evidence of prior misconduct constituted prejudicial error in the circumstances of this case.

2. Whether the government's introduction of prior misconduct evidence violated a pretrial "Omnibus" agreement.

RULES INVOLVED

Fed. R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in comformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of two counts of aiding and abetting the possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and of one count of conspiracy to commit those offenses, in violation of 21 U.S.C. 846.[1] Petitioner was fined $15,000 and sentenced to consecutive terms aggregating 24 years' imprisonment, to be followed by 15 years' special parole (A. 469).[2] The court of appeals affirmed (Pet. App. A).

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[1]The indictment charged Billy Frank Alexander and Martin Castilleja Vega with the same crimes (A. 1-5). Vega was tried jointly with petitioner and was acquitted on all counts (A. 474). Alexander pleaded guilty to the charges, and he testified for the defense at petitioner's trial (Pet. 3).

[2]"A." refers to the appendix in the court of appeals.

The evidence showed that petitioner aided and abetted Billy Frank Alexander in the sale of approximately 268 grams of heroin, in two installments, to an undercover agent on assignment to the Drug Enforcement Administration (A. 49). On April 26, 1974, the date of the first transaction, agent Alfonso Cavalier met with Alexander to negotiate a heroin purchase at the Continental USA Club (A. 53-54), a bar owned and operated by petitioner in San Antonio, Texas (A. 310, 315-316). Agent Cavalier first arranged to purchase a sample ounce of heroin for $750 (A. 65), but after waiting for delivery at the Club for more than an hour, he complained to Alexander that the deal was taking too long to consummate (A. 66). Alexander responded that he would check on the delay and then went outside to confer with petitioner, who was operating a streetcorner beer concession for spectators of the annual Fiesta parade. After talking for a moment with Alexander, petitioner made a phone call and then returned to Alexander for another brief conversation. Alexander returned and told Cavalier that traffic congestion along the parade route was responsible for the delay. Agent Cavalier then left the Club, telling Alexander to call him when the heroin was ready (A. 66-69).

Agent Cavalier returned to the Club early in the evening. Before entering he asked petitioner, who was still stationed in front, whether "everything was ready." Petitioner replied: "everything is ready, go in and talk to Alex" (A. 70). Alexander instructed agent Cavalier to enter an alley adjacent to the Club; the heroin was hidden there. Cavalier retrieved the package of heroin from the alley and, before reentering the Club, held it out so that petitioner could see it. Petitioner responded by nodding his head affirmatively (A. 70-74).

On May 7, 1974, agent Cavalier met with Alexander at the Continental USA Club to arrange a larger purchase. Cavalier gave Alexander $3,000, representing approximately half of the purchase price. Alexander wrapped the money in a piece of paper, on which he wrote "the other half on delivery," and placed the money on a shelf underneath the Club's cash register (A. 79-81, 85). The two men then locked the Club and left; they returned approximately five minutes later (A. 87-89). During their brief absence petitioner was observed by other agents on the scene entering the Club for approximately two minutes and then walking away toward his parked car (A. 156-159, 208-209).

Back inside the Club, agent Cavalier noticed that the $3,000 was missing and demanded an explanation. Alexander replied: "Don't worry about your money. The man has got your money. He came in here and got it" (A. 89). After receiving a phone call during which he apparently was given information regarding the location of the heroin, Alexander led agent Cavalier to a nearby alley, where they picked up the heroin (A. 90-91). Petitioner and Alexander were arrested a short time later. Agents subsequently searched petitioner's car; they found the $3,000 wrapped in the note (A. 201-208).

ARGUMENT

1. Petitioner testified in his own defense. He conceded that he had been at the Continental USA Club on the dates in question but claimed that, although the activities of agent Cavalier and Alexander had aroused his suspicion, he had been unaware of the illicit nature of

their dealings (A. 320-334).[3] On cross-examination the prosecutor elicited the fact that petitioner had been involved in a similar heroin deal in 1969 and that, in return for his cooperation with government investigators, he had not been indicted on drug charges (A. 349-358). In its rebuttal case, the government presented the testimony of the agent who had handled the 1969 case (A. 381-390). Petitioner claims (Pet. 5) that the court erred in admitting this evidence of his past misconduct.

Evidence of prior misconduct is inadmissible to show a defendant's criminal disposition. It is admissible, however, when relevant to show that the accused possessed the requisite intent or knowledge to be held culpable for the crime charged. Fed. R. Evid. 404(b); *Spencer* v. *Texas*, 385 U.S. 554, 560-561. While, as petitioner correctly suggests, there appears to be a conflict among the circuits concerning the precise scope of the "intent" or "knowledge" exception to the general rule of exclusion (compare, *e.g.*, *United States* v. *Fierson*, 419 F.2d 1020 (C.A. 7), with *United States* v. *Castro*, 476 F.2d 750, 753-754 (C.A. 9)), all of these cases involved trials prior to the effective date of the Federal Rules of Evidence. The commentary to Rule 404(b) makes it clear that, under the new rules, the proper test for the admissibility of evidence of past misconduct is the "balancing" test established by Rule 403. The Advisory Committee's commentary states, for example, that "[t]he determination must be made whether the danger of undue prejudice outweighs the probative value

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[3]Alexander testified that petitioner had not been involved in either sale (A. 244-308). Alexander testified that the $3,000 was in petitioner's car because he had borrowed the car for the day and had instructed his girlfriend to place the money there for safekeeping (A. 269-270).

of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." See also S. Rep. No. 93-1277, 93d Cong., 2d Sess. 25 (1974): "the trial judge may exclude [evidence of other misconduct] only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time."

Even if the many standards now articulated by the courts of appeals survive the enactment of the new rules, it is unnecessary for the Court to essay its views in this case. The evidence against petitioner, although circumstantial, was cumulatively powerful. He was seen entering and leaving the Club during a brief interval in the course of which $3,000 of the purchase money for the heroin disappeared; the money was recovered from petitioner's car. He admitted (A. 335-340) speaking to Alexander throughout the day of the first sale and making telephone calls such as those agent Cavalier had described. Agent Cavalier testified that petitioner told him that "everything is ready" just before the delivery of the first ounce of heroin was accomplished. The admission of the evidence of prior misconduct therefore was harmless error, if error at all.

Moreover, it is not clear that the Sixth Circuit, which in *United States* v. *Ring*, 513 F.2d 1001, has adopted the rule for which petitioner contends, would have found error in this case. *Ring* held that the government is not entitled to introduce, in its case-in-chief, evidence of prior similar acts designed to show intent unless the question of intent is genuinely in issue. In *Ring* itself the court concluded that the circumstances of the crime so obviously established intent that the only open question was whether the defendant was the person who accomplished the deeds. The case here is quite different: the

government did not introduce the "other crime" evidence until after petitioner's direct testimony, and petitioner's defense at least by implication called his intent into question. Petitioner's acts were ambiguous. He testified that they were innocent acts, thereby raising questions concerning his state of mind. As the court of appeals wrote (Pet. App. A-3 to A-4): "[Petitioner] here had taken the stand, admitted his presence at the scene of the transaction, but generally denied his involvement. This denial carried with it a denial of intent to be involved. No cases cited support [petitioner's] contention that the kind of defense asserted in this case removed intent as a material issue to the point where the prior transaction 'intent' exception should not apply."[4]

2. Petitioner contends (Pet. 16) that the government's disclosure of his heroin dealings on rebuttal violated an agreement "not to introduce evidence of prior acts for the purpose of establishing knowledge or intent," an agreement allegedly concluded during the pretrial "omnibus" hearing. This argument is insubstantial, for the section of the so-called "Omnibus Form" upon which petitioner rests his claim clearly shows that the government made no such commitment (A. 7). Section 5(a) of the form—which reads: "The government (will) (will not) rely on prior *acts* * * * for proof of knowledge or intent"—was marked "N/A" in the margin. This mark indicates, according to the instructions (A. 6), that the section is "not applicable" to the agreement between the parties. Such inconclusive answers on an omnibus form create no

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[4]The evidence also may have been admissible to impeach petitioner's credibility. On direct examination, in response to a question by his own counsel, petitioner testified that he never discussed narcotics with anyone (A. 321). The evidence demonstrating his prior involvement in narcotics would cast doubt upon the truthfulness of this assertion.

enforceable duties. *United States* v. *Williams*, 496 F.2d 378 (C.A. 1). And the district court correctly stated (A. 199) that any agreements reflected in the omnibus form bound the government only in its case-in-chief. Thus, even if the abbreviation "N/A" could be construed as an agreement not to use evidence of prior misconduct, the government fully complied with that agreement. Once petitioner took the stand and placed the matter of his knowledge or intent in issue, the government was free to rebut that testimony with evidence of petitioner's prior similar misdeeds.[5]

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[5]The court of appeals rejected this claim of petitioner on the ground that petitioner had not specifically raised the alleged violation of the omnibus agreement as the basis for his objection to the admission of the prior misconduct evidence (Pet. App. A-4). While petitioner did not mention the alleged breach at the time the evidence was actually introduced, we do not rely upon this ground, for the record shows that petitioner raised the matter earlier with the trial court in anticipation of the government's use of that evidence. The trial court correctly ruled that the omnibus agreement did not prohibit the government's use of such evidence (if otherwise admissible) in its rebuttal case (A. 38-39, 196, 199-205).

Petitioner asserts that the decision of the court of appeals conflicts with that court's earlier decision in *United States* v. *Scanland*, 495 F.2d 1104. But any conflict between decisions of the same court of appeals would be for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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